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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1746

NYDIA MARIA DIAZ-BUXO,

Petitioner,

v.

HON. JOSE TRIAS MONGE, CHIEF JUSTICE OF THE SUPREME COURT OF PUERTO RICO ET ALS.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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May 21, 1979

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HON. JOSE TRIAS MONGE, CHIEF JUSTICE OF THE SUPREME COURT OF PUERTO RICO ET ALS.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Nydia Maria Diaz-Buxo, pro se, respectfully requests a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on this proceeding on February 23, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is included in the Appendix hereto. The opinion of the United States District Court for the District of Puerto Rico as well as the prior opinion of the Circuit Court of Appeals for the First Circuit are also included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on February 23, 1979 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

The questions presented for review are:

Whether or not, an Ex Parte Petition summarily denied with "No ha lugar" or review denied could be grounds for res judicata; and whether or not, this review denied could be grounds for certiorari to this Honorable Supreme Court.

Whether or not, an ad hoc system of secret quotas as described and explained by a Puerto Rico Supreme Court Judge (Dissenting Opinion, *In Re Request of the Board of Bar Examiners,* 97 P.R.R. 853 (1969)) is inmaterial as to determine the convening of a three-judge court as to hear, adjudge and decide questions on whether the standards governing the Puerto Rico bar licensing procedures of attorneys meet the constitutional requirements of due process and equal protection.

Whether or not, an unsupported Motion to Dismiss on res judicata grounds filed after two previous Motions to Dismiss on jurisdictional grounds have been filed, could meet the requirements of the Federal Rules of Civil Procedure specifically Rules 8(c), Rule 12(b)(g) and whether or not, Rule 6(e) is to imply that service by mail automatically enlarges the time set forth in an Order of the Court as to grant three days for arrival from the time when the Clerk filed the Order of the Court and three days for mailing services after the thirteen days period is computed.

STATUTORY PROVISIONS AND RULES INVOLVED

The due process clause of the Fifth and Fourteenth Amendments to the United States Constitution as well as the equal protection clause; 28 U.S.C.A. 1331, the Civil Rights Act, 42 U.S.C.A. 1981, 1983; 28 U.S.C.A. 1343(3) are involved. It also questioned the provisions set forth in 28 U.S.C. 2281 in substantive and procedural jurisdictional aspects as well as Rule 6(e); Rule 8(c) and Rule 12(b)(g) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner, as Plaintiff in the original Complaint at the Puerto Rico Federal District Court, challenged the denial of her admission to the bar of the Commonwealth of Puerto Rico and sought a declaration that the licensing procedures of attorneys in Puerto Rico as described in a published opinion by a Puerto Rico Supreme Court Judge are arbitrary,

and in fact, are a quota, as to prevent the "uncontrolled" influx of lawyers in the Island (*In Re Request of the Board of Bar Examiners*, 97 P.R.R. 853, 1969). Petitioner questioned whether the system as applied to this particular Petitioner is, in itself, a denial of due process and equal protection. Petitioner stated that the absolute and complete absence of review constitute a ban to the Applicant as to have an adversary procedure or in equitable language, "a fair day in court". The system in Puerto Rico does not provide for a master, judge, examiner or the like as to entertain Applicant's claims, either in the administrative or judicial field. The Regulations established for the bar exam provides for an automatic review of certain cases in the 50-60% margin, whereby Petitioner qualified. She was denied that review. (*Record Civil Action 75-116*, U.S. District Court for the District of Puerto Rico, Complaint filed on February 4, 1975, Document No. 1).

Petitioner alleged at the District Court that she was certain she passed that exam; that the criteria or standard as to rational capacity to practice a profession is "Once is enough" (Fourth Circuit stated that criteria in *Richardson v. McFadden*, 540 F.2d. 744, 752, 1976); and that the denial of her license as well as the denial of process and access to her record, examination notebooks, and grading criteria as to evidence to her federal claims are grounded on that system of quotas used to control the size of the law profession and market in the Island (*See Examiner Board of Engineers, Architectures, and Surveyors v. Flores De Otero*, 426 U.S. 572, 96 S.Ct. 2264, 2283, 1976). Petitioner requested the convening of a three judge court as to hear, determine and adjudge the rights of the parties under the then applicable 28 U.S.C.A. 2281.

On February 14, 1975, the Puerto Rico Supreme Court in absentia, entered a summarily "No ha lugar" Resolution whereby the Ex Parte Petition filed by Petitioner at the Board of Bar Examiners was dismissed. "No ha lugar" in fact, means "review denied". (*Record Civil Action 75-116*, Document No. 7, Plaintiff Memorandum of Law, March 31, 1975, Appendix A, translated in Appendix B, pages 29, 30). The original of that Resolution as well as the copies were never signed nor sealed by the Puerto Rico Supreme Court's Clerk in order that a document be authenticated and hence: valid (*Record Civil Action 75-116*, Document No. 14, Defendants' Motion with Exhibits dated February 17, 1979, as shown and certified in the Exhibits, and in Documents No. 24, April 25, 1979, as shown and certified in the Exhibits by the Puerto Rico Supreme Court Clerk). As shown in the record of this case, the members of the Puerto Rico Supreme Court were summoned by the U.S. marshall and served with the Complaint prior to the date of the February 12, 1975 Resolution; and a date for oral hearings had been set in the calendar of the District Court. (*Record, Document No. 2).* The Puerto Rico Supreme Court Judge, who served in his capacity as head or President to the Board of Bar Examiners, was among the Judges who entered the Review Denied Resolution. Upon information and belief, the other Supreme Court Justices never entered in a meeting whereby they could see, review, or question the merits of the petition filed.

Respondents filed two Motions to Dismiss for lack of jurisdiction, (*Record, Document No. 3*, Defendants' Motion filed February 25, 1975, *Document No. 7*, Defendants' Motion filed March 18, 1975). A single Judge at the District Cout determined that no substantial federal question had been presented (*Record Document No. 8*, Opinion and

Judgment filed December 16, 1976, included in the Appendix hereto). The Court of Appeals for the First Circuit reversed and remanded on December 14, 1977 (*Record Document No. 10,* Opinion included in the Appendix hereto). The District Court Judge was to determine whether the case was "moot" or whether the res judicata defense was to be raised in the answer to the Complaint, and "if neither of the above issues is determinative, or if the answer to them is uncertain, the district court should request the appointment of a three judge court".

Petitioner filed a Motion incorporating Memorandum of Law as to request the convening of a three-judge court as ordered by the Appellate Circuit Court (*Record, Document No. 12,* filed January 26, 1979) whereby Petitioner stated the grounds for judgment on default under Rule 55 of the Federal Rules of Civil Procedure. The Motion was not opposed by Defendants. The District Court, sua sponte, entered an order requesting Defendants "to file an answer to the Complaint within a period of ten (10) days from the entry of the Order and to submit therewith a certification or other appropriate document indicating whether plaintiff has retaken the examination subject to this suit, and if so, whether she passed it". (*Record Document No. 13,* filed February 6, 1979). The Order was not complied by Defendants.

Defendants filed a Motion to Dismiss on unsupported grounds of res judicata and a Memorandum of Law which quoted certain exhibits filed at the Court but not mailed to the Plaintiff (*Record, Document No. 14,* February 17, 1979). The grounds for res judicata were predicated on untranslated documents in the Spanish language of the original files from the Puerto Rico Supreme Court which clearly sustained the fact that the originals were unsigned, unsealed by the Clerk as requested by the Puerto Rico Supreme Court Regulations;

in order that a document of that Court be valid. The answer to the Complaint was not filed as ordered by the District Court as well as the Circuit Court of Appeals. Petitioner requested several times a judgment by default (*Record Documents No. 14-25*).

The District Court dismissed the case on grounds of res judicata, (*Record Document No. 26,* May 2, 1979, Opinion included in the Appendix hereto). Petitioner appealed on grounds that: res judicata was only available, if any, as a defense in the answer to the Complaint under Rule 8(c) since Rule 12(b) was exhausted in 1975 without a mention to the res judicata defense and hence, waived under Rule 12(g) since it was not consolidated in the prior motions on jurisdictional grounds; second, the elements of the doctrine of res judicata were not met in the Motion to Dismiss filed on February 17, 1979 (no identity of the parties, not the same issues, not a final determination on the merits, not a day in court, not mutuality of estoppel); third, untranslated documents could not served as grounds for a federal disposition of a case; fourth, a review denied could not be grounds for res judicata and fifth; the Motion to Dismiss was improper and untimely filed under the Rules of Civil Procedure. Petitioner further contended that those documents could not be grounds for res judicata since the lack of authenticity on their face prevented Plaintiff from seeking a review by way of certiorari back in 1975 from this Honorable Supreme Court, and that those documents were unsigned and unsealed in order to prever Petitioner from seeking a writ from this Court and therefor, continued with the system of quotas, as to prevent the uncontrolled size of the law profession is the Island. Petitioner also contended that the acts of the Federal District Judge in translating sua sponte, specific parts of the documents in order as to ground his opinion were ultra vires,

improper, and bias. Defendants contention amounts to a theory that a certiorari back in 1975 was the only remedy; and that Petitioner had to seek a certiorari from a Resolution entered after a Complaint had been filed in the federal forum; and that the fact that the documents were not signed nor sealed by their own Clerk is completely inmaterial on that theory; it is also inmaterial that proper translations were not furnished to the Federal Court. The ultra vires acts of the Federal Court of translating in chambers, in absentia and without the knowledge of the parties is under the complete sound discretion of the court. As to the res judicata defense, it could be raised under Rule 12 until an answer to the Complaint is filed and hence never waived. Rule 6(e) is read as to grant three additional days after the Court Order is filed in order that the mail is received by the Respondents. Three additional days must also be computed in order that mailing be served after the thirteen day period is exhausted. Apparently, Rule 12 continues ad infinitum until the Court request Rule 8 to be complied with under and order of default.

The First Circuit Court of Appeals as well as the District Court ignored the questions on whether the Supreme Court of Puerto Rico intervention had been administrative or judicial in nature which was the issue raised by the Appellate Court's First Opinion (Opinion dated December 14, 1977 included in the Appendix). If the Supreme Court's intervention was not judicial, then the Judges had to approve the exam and had to approve or disapprove the answers to the exam. This, they did not do. No procedure exists for the in chamber process. If the intevention was judicial, the Judge who presides the Board participated in the judicial procedures, if any, held in the absence of the party who claimed arbitrariness. If the Supreme Court of Puerto Rico was acting in an administrative capacity, then the res judicata

doctrine did not apply; and if the Supreme Court entered the Resolution in their judicial role, the facts as stated seems ultravires, bias, unfair and improper of a court of law, which calls for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

I.

IMPORTANT FEDERAL JURISDICTIONAL AND PROCEDURAL ISSUES ARE PRESENTED IN THE PRESENT CASE. THE DECISION BELOW CONFLICTS WITH THE RULES AND INTERPRETATION PREVIOUSLY GIVEN TO THE FEDERAL RULES OF CIVIL PROCEDURE BY THIS HONORABLE SUPREME COURT AND THE FEDERAL APPELLATE DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH COURSE BY THE LOWER DISTRICT COURT, AS TO CALL FOR AN EXCUSE OF THIS COURT'S POWER OF SUPERVISION.

The Decision below presents a new novel scheme of theories on the interpretation to the Federal Rules of Civil Procedure, specifically Rule 6(e), Rule 8 and Rule 12 as to ground a new system of federal jurisdictional procedures which if followed by other federal courts, might present a national chaotic situation.

A. Rule 6(e)

Rule 6(e) as understood by the Circuit Court, presents the idea that if an order of a federal court is filed on a certain specific date and orders Defendants to file within a period of ten days from the entry of the Order; the answer could be filed on the day sixteen; since it takes the mail three days to get to Defendants and three days for the Defendants to mail their answer. Accordingly, the period is not in fact ten days from entry of the Order but thirteen days from mailing of the Order. Under this new theory, no federal district or circuit court could morally nor legally enforced a default under Rule 55 before sixteen days from the entry of the Order. We respectfully suggest that a certiorari be issued in order as to prevent this interpretation, which if followed, could produce great national economical disaster.

B. Rule 8(c), Rule 12(b)(g)

Rule 8(c) and Rule 12(b)(g) as to the interpretation and procedures followed on the defense of res judicata calls for an exercise of this Honorable Court's power of supervision. Under the novel theory presented by the Court below, a party will never waive the defense of res judicata as long as an answer to the Complaint under Rule 8(c) has not been filed. Accordingly, the Rule 12(g) is in fact, abolished.

The Court of Appeals instructed the Defendants to answer the Complaint and raise, if possible, the defense of res judicata. The same course was ordered to the Defendants by the District Court's Order of February 6, 1979. Defendants disobeyed and raised a third Motion to Dismiss under Rule 12, on grounds which had not previously been taken. Since

the District Court admitted the incorrect proceeding and sanctioned it as correct, and since the Court of Appeals sanctioned such course of action by the lower District Court we respectfully request the exercise of this Court's power of supervision in order as to prevent the future effect of this theory: since to admit this opinion and course of procedural actions as correct implies that in the future, no Defendant whatsoever will ever answer a Complaint until the frivolous exhaustion of all possible defenses be raised in separate Motions to Dismiss. There should be no doubt that Rule 12(g) has not been abolished by this Court.

C. Language

The third theory of the District Court which was sanctioned by the Court of Appeals which cails for the power of supervision of this Court deals with the national language, and translations. The theory amounts to an admission that as long as the lower court and parties understood the language which in fact, is foreign under the Federal Rules for the District Court, the lack of translation is harmless. The fact that the District Court translated sua sponte, in chambers, without the knowledge of the parties and ultravires certain specific portions of the documents presented without translation is deemed harmless. We suggest that the Circuit Court was not in a position as to determine whether or not the lack of translation is harmless if all the Judges in the Circuit Court are not by themselves fluent in the foreign language. Indeed, this theory suggest that anything which could not be understood by the court is harmless; until the party who has fullfiled with the court's Rules and Regulations on translations also provides interpretation and translations to the

documents sought by the opponent as evidence to their case. We respectfully suggest that the non-compliance with the Rules and Regulations of the District Court in translations is harm in itself and that in the future, if this case is followed, there won't be a need for an Appellate court since anything which is not understood by the higher court will be deemed as correct and harmless. The Circuit Court went so far in sanctioning the District Court's incorrect and ultravires acts as to call for an exercise of supervision by this Honorable Supreme Court.

II.

THE OPINION BELOW PRESENTS INTRACIRCUIT CONFLICT WITH THE PRIOR OPINION AND JUDGMENT PER CURIAM IN THE SAME CASE; WHICH IN FACT, RELATED TO A RECURRING AND IMPORTANT ISSUE WIDESPREAD AMONG THE CIRCUITS, AND THE DECISION BELOW CONSTITUTE A CONFLICT WITH PRIOR DECISIONS RENDERED BY THE UNITED STATES SUPREME COURT AS WELL AS OTHER CIRCUIT COURT OF APPEALS.

The opinion below is the result of the instructions specified and ordered in a previous Per Curiam Decision in the same case and included in the Appendix hereto. The Opinion stated supra and entered on December 14, 1977, could not decide the issue on res judicata grounds, according to the Appellate Court, from the record of the case. In fact, the Opinion admits that new evidence is expressly requested by

the Circuit Court in order to ground a res judicata decision. The second Opinion of the First Circuit entered on February 23, 1979 and included in the Appendix hereto, admits on page 4, that the new evidence requested by the Circuit Court from the Defendants was not included in the record on the second appellate proceedings. If the first Opinion on grounds of the first appeal showed to the Appellate Court Per Curiam an impossibility to decide res judicata on the face of the record; and if the Court of Appeals could not understand the documents in their originals as were furnished by the Defendants on the second appeal, we respectfully suggest that there was nothing on record as to change or modify the Circuit Court's prior holding that "... *If neither of the above issues is determinative or if the answer to them is uncertain,* the district court should request the appointment of a three court" (emphasis ours).

Indeed, the three judge court was sought as to adjudge matters of nation wide importance, since the procedural system of admissions to the law profession in Puerto Rico are in fact, a secret system of quotas which conflicts with this Court's decisions in cases like *Regents of the University of California v. Bakke,* 46 Law Week 4896 (1978); as well as with other circuit cases like *Richardson v. McFadden,* 540 F.2d. 744, 752 (1976). The decision below nullifies the standards set forth by this Supreme Court in cases like *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957), *In Re Application of Griffith,* 413 U.S. 717 (1973), *Examining Board of Engineers, Architects and Surveyors v. Flores De Otero,* 426 U.S. 572 (1976), *Ex Parte Garland,* 4 Wall 333, 71 US 333 (1866) as well as with other state decisions like *Application of Guberman,* 90 Ariz. 27, 363 P.2d. 617 (1961); *Application of Burke,* 87 Ariz. 336, 351 P.2d 169 (1960); *Application of Levine,* 97 Ariz.

88, 397 P.2d 205 (1965); *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S. Ct. 702 (1971); *Keenan v. Board of Bar Examiners of the State of North Carolina*, 317 F. Supp. 1350 (1970). The decision below presents a new gate for future Defendants to deny applicability to the doctrine set forth recently by this Honorable Supreme Court in the nationwide leading case of Bakke, *supra*. Quotas and desire to discriminate may be unpersuasive on their face as set forth by this Honorable Court, but with this new device of non-answering under Rule 8 until all possible frivolous motions be presented separately under Rule 12; the idea of quotas and discrimination may continue forever. Indeed, the decision below in summary amounts to a shield on the res judicata ground for those Defendants who intentionally creates a system of secret quotas discrimination. We respectfully request that a writ of certiorari be issued as to review this problem.

III.

THE DECISION BELOW PRESENTS QUESTIONS ON EVIDENCE WHEREBY THE DECISION IS SO TOTALLY DEVOID OF EVIDENTIARY SUPPORT AS TO RENDER THE OPINION UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Decision below presents the ultimate question on whether the decision is so totally devoid of evidentiary support as to render the decision per se unconstitutional under the due process clause. The final question presented

herein as this Supreme Court has stated in the past "turns not on the sufficiency of the evidence but on whether the decision rests upon any evidence at all". *Thompson v. City of Louisville*, 362 US 199 (1960); *Garner v. Louisiana*, 368 US 157, 163 (1961); *Washington v. United States*, 357 US 348 (1958). Indeed, to deny a license to practice law or any profession at all to an applicant who has fully fullfiled the requirements of the test on rational capacity is to be considered a punishment in the absence of evidence to ground such penalty in the civil side of the court as would be imprisonment in the criminal side of the court. The licenses in these cases of quotas represents a ban in fact to the practical ways of earning a living.

Since the Circuit Court of Appeals is a non-fluent Spanish speaking corpus, and therefore, Spanish is completely foreign for them; since the record as stated by them was not under their consideration (Opinion of February 23, 1979, page 4, included in the Appendix hereto); and since the record, even if brought to the Court's consideration was untranslated and therefore unreadable; and since in their first Opinion (included in the Appendix, Opinion of December 14, 1977) the Circuit Court admitted their impossibility to enter a ruling on res judicata because the record brought to them did not sustain such holding; and since the record brought to them the second time was unreadable; the question turns out to be whether the decision below rests on any evidence at all. If the translations are harmless errors and the Court is unable to read the originals; how could the Circuit Court ground a holding on res judicata when they were unable to do so during the first appeal? How could any court rule that something is harmless if that something is unknown to the members of the judicial body? Where is the evidence to sustain the ruling? We respectfully suggest that if

the actions of the District Court as to translate in chambers, sua sponte, without the knowledge or opportunity to question that translation of specific parts of the documents when the lower Court is aware that the Appellate Circuit could not understand the originals as documents as a whole, the whole case turns out to be an unconstitutionasl proceeding against the best interest of proper judicial conduct. This system and procedures in chambers, in the absence of evidence and/or procedures are precisely the medula of the whole system of quotas which has brought this case to the federal forum. The case turns out to the question on how could a party successful in a prior appeal loose the remedies already held as proper on a subsequent appeal when the lower Court has not followed the mandates of the appellate division and when there is nothing on record as to sustain a reversal? The record of this case shows an unique system of non-following the orders of the highest courts and the Circuit Court has gone so far away from the law and usages as prescribed by this Honorable Supreme Court as to suggest a supervisory review by this Supreme Court in the best interest of the law profession.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court below.

Respectfully submitted,

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Member to the Pennsylvania Bar
PRO SE

May 21, 1979

United States Court of Appeals
For the First Circuit

No. 78-1260

NYDIA MARIA DIAZ-BUXO,
PLAINTIFF, APPELLANT,
v.
HON. JOSE T. TRIAS MONGE, ETC., ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. HERNAN G. PESQUERA, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

Nydia Maria Diaz-Buxo, pro se.
Miguel A. Santana Bagur, Assistant Solicitor General, Department of Justice, with whom *Hector A. Colon Cruz*, Solicitor General, was on brief, for appellees.

February 23, 1979

CAMPBELL, *Circuit Judge*. Plaintiff appeals from the district court's dismissal of her complaint on the ground of res judicata and from the court's refusal to enter judgments of default against the defendants. Plaintiff's original complaint in the district court challenged the denial of her admission to the Puerto Rico Bar. The complaint, based on 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. §§ 1331, 1343(3) against the Supreme Court of Puerto Rico, its clerk, the Board of Puerto Rico Bar Examiners, and the Board's executive secretary, sought a declaration that the procedures for licensing of attorneys are arbitrary and thus constitute a denial of due process, a declaration

that plaintiff is entitled to a license to practice law and an order compelling defendants to grant said license, and damages. Plaintiff alleged she was certain she passed the exam, that she was denied access to her exam and record, and that the absence of review procedures violates due process. She requested the convening of a three-judge court under then applicable 28 U.S.C. § 2281. Defendants' motion to dismiss for lack of jurisdiction was granted by a single judge, who determined that no substantial federal question had been presented. This court reversed, holding the single judge was without jurisdiction to dismiss plaintiff's claim as meritless. In remanding, however, we instructed the single judge, before requesting the convening of a three-judge court, to determine whether proceedings plaintiff had pursued in the Puerto Rico Supreme Court prior to instituting the federal suit barred the instant suit under the doctrine of res judicata.

The district court on remand ordered the defendants to file their answer to plaintiff's complaint within ten days and to submit therewith documentation indicating whether or not plaintiff had retaken the bar exam and passed. Eleven days after entry of the district court order, defendants, without filing an answer, moved to dismiss on the basis of res judicata. Plaintiff subsequently sought to default the defendants for failure to comply with the order. This motion was not granted, plaintiff's complaint was dismissed on res judicata grounds, and plaintiff appealed.

Plaintiff first argues that defendants' motion to dismiss on the ground of res judicata was procedurally improper because res judicata may only be asserted by answer, Fed. R.Civ.P. 8(c), not by motion, Fed.R.Civ.P. 12(b), and because the filing of this second motion to dismiss is prohibited by Fed.R.Civ.P. 12(g). Ordinarily, res judicata is pleaded as an affirmative defense. Fed.R.Civ.P. 8(c). However, where the substantive rights of parties are not

endangered, it is within the discretion of the district court to permit it to be raised by motion. *Lambert* v. *Conrad*, 536 F.2d 1183 (7th Cir. 1976); *Thomas* v. *Consolidated Coal Co.*, 380 F.2d 69 (4th Cir. 1967), *cert. denied*, 389 U.S. 1004, *reh. denied*, 399 U.S. 1059; *Williams* v. *Murdock*, 330 F.2d 745 (3d Cir. 1964); *Hartmann* v. *Time, Inc.*, 166 F.2d 127, 131 n.3 (3d Cir. 1948), *cert. denied*, 334 U.S. 838; *348 Bloomfield Avenue Corp.* v. *Montclair Manufacturing Co.*, 90 F. Supp. 1020 (N.J. 1950); C. Wright & A. Miller, *Federal Practice and Procedure* § 1277 (1969). Here, plaintiff had ample opportunity to respond to defendants' motion as she in fact did in her lengthy motion in opposition to defendants' motion to dismiss. The prohibition of Fed. R.Civ. P. 12(g) against successive pre-answer motions expressly covers only those motions brought under Rule 12, though its policy may pertain in other instances. As there was no prejudice to plaintiff resulting from the procedural format in which the issue of res judicata was considered, we do not find it to be reversible error for the district court to have entertained the issue by motion in these circumstances.

Plaintiff's argument that it was error for the district court to refuse to default defendants under Fed.R.Civ.P. 55 is based on defendants' failure to file an answer within the specified ten days. Plaintiff reiterates the argument considered above — defendants' proceeding by motion rather than by answer — and contends that even if defendants' motion is treated as an appropriate response to the district court's order, it was filed too late. Defendants, invoking Fed.R.Civ.P. 6(e) which enlarges the time for response by three days when service is made by mail, argue their motion was timely. Whether or not service of the district court's order was by mail is not apparent from the record, although it seems unlikely that notice would be served personally. The district court, in any event,

rejected plaintiff's objection to timeliness, denied plaintiff's motion to default the defendants, and proceeded to the merits of defendants' motion. The court thus implicitly upheld the timeliness of defendants' response. In the absence of contrary evidence, we see no reason to disturb its actions.

Attached to defendants' res judicata motion were six supporting exhibits apparently consisting of plaintiff's motions to the Puerto Rico Supreme Court and the Court's responses thereto. These exhibits have not been included in the record on appeal. Plaintiff argues it was error for the district court to consider these exhibits because they were not properly authenticated under Rule 8(g)[1] of the Rules of the Supreme Court of Puerto Rico and because the documents were in the Spanish language violating Rule 6 of the Rules of the United States District Court for the District of Puerto Rico.

Rule 8(g) provides:

> "The Clerk shall be the keeper of the seal of the Court, and all documents signed by him in original or facsimile and with the seal of the Court, affixed thereon, shall be deemed duly authenticated."

Defendants have stated that one of the documents submitted was signed by the clerk and that this document certified the remainder as being copies of the originals. Plaintiff's challenge to the authenticity of these documents appears in various of plaintiff's motions before the district court. The district court's acceptance of the documents into evidence imports a determination that they were properly authenticated, and as there is nothing before us to indicate this determination was erroneous, we have no reason to disagree with it.

Rule 6 of the rules of the district court provides in pertinent part:

[1] Plaintiff's brief refers to Rule 5(g) which does not exist.

> "A. Translations. All documents not in the English language which are presented to or filed in the Court, whether as evidence or otherwise, shall be accompanied at the time of presentation or filing by an English translation thereof, unless the Court shall otherwise order."

Under this rule, the district court has discretion to order the acceptance of documents in a language other than English. While no formal order was entered, all parties appear to have been fully conversant with Spanish. Plaintiff does not say that these documents were not readily understood by her, nor has she questioned the accuracy of the judge's translation. If there was error, it was clearly harmless. *See* Fed.R.Civ.P. 61.

Finally, plaintiff argues her complaint was not properly dismissed on the ground of res judicata because the Puerto Rico Supreme Court never passed upon the merits of her federal constitutional contentions but instead simply denied her any review at all.

It appears from the opinion of the district court that plaintiff presented three motions to the Puerto Rico Supreme Court before filing her complaint in the federal court. The first motion, dated December 3, 1974 and entitled Motion for Appeal and/or Review under Rule 49 of Civil Procedure, attacked the bar exam as lacking objectivity and asked for a review of plaintiff's case. This motion was denied on December 17, 1974. The second motion, dated December 23, 1974, requested a copy of plaintiff's exam, the answer key tc same, the rules adopted by the Supreme Court and board of bar examiners relative to said exam, the minutes and deliberation of the board, and copies of the exams of all other applicants. Plaintiff's third motion, a motion for reconsideration dated December 23, 1974, alleged in part:

> "That the Supreme Court's determination related to petitioner, of not admitting her to the exercise of the law lacks basis and violates her right to due process and to the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America; because the rules for grading for approval are arbitrary and because the procedure of designing and correcting the exam is arbitrary itself."

The district court determined that the issues raised by plaintiff in her § 1983 suit were virtually identical to those advanced before the Supreme Court of Puerto Rico, a determination with which we agree and which has not been challenged by plaintiff.

The Puerto Rico Supreme Court responded in material part to the December 23, 1974 motions as follows:

> "To the writs dated December 23, 1974, one entitled 'Motion for Reconsideration' and the other entitled 'Motion', *no ha lugar.*"

The court went on to note that no purpose would be served by allowing plaintiff to see the bar exam responses because the examiners make no notations thereon.

Neither copies of the plaintiff's motions nor of the Court's response thereto are contained in this record on appeal. On the other hand, none of the parties dispute the correctness of the district court's summary of plaintiff's motions and the Supreme Court's responses thereto. Plaintiff's disagreement is with the district court's conclusion that the resolution "no ha lugar" was a disposition on the merits and that therefore plaintiff was collaterally estopped from relitigating her constitutional claims in the federal court.

In the context of a petition for certiorari to the Puerto Rico Supreme Court the phrase "no ha lugar" is equivalent to the statement certiorari denied. It does not imply

approval of the lower court decision, but merely denotes that the court will not exercise its discretion to grant the extraordinary relief requested. *Suarez* v. *Administrator Del Deporte Hipico de Puerto Rico,* 354 F. Supp. 320 (D.P.R. 1972); *Borinquen Furniture, Inc.* v. *District Court,* 78 P.R.R. 858, 861 (1956); *Bartolomei* v. *Superior Court,* 77 P.R.R. 436, 437 (1954); *Algarin* v. *District Court,* 59 P.R.R. 848 (1942). *See also Fernandez* v. *Trias Monge,* 586 F.2d 848, 857 (1st Cir. 1978). The district court, based on its familiarity with local procedure, ruled that while "no ha lugar" is an administrative disposition of a case in the context of a writ of certiorari, in the instant proceeding it was equivalent to the statement "reconsideration denied" and was a disposition on the merits of plaintiff's constitutional claims. The judge indicated this result was underscored by the fact that the Supreme Court had accompanied the "no ha lugar" by an explicit consideration of some of plaintiff's arguments.

Substantial deference must be accorded the district court's determination on this matter of local procedure. *Berrios Rivera* v. *British Ropes, Ltd.,* 575 F.2d 966, 970 (1st Cir. 1978); *Graffals Gonzalez* v. *Garcia Santiago,* 550 F.2d 687, 688 (1st Cir. 1977); *Cf. Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 43 (1970); *Bonet* v. *Texas Co.,* 308 U.S. 463, 470-71 (1940); *Bonet* v. *Yabucoa Sugar Co.,* 306 U.S. 505, 510 (1939); *Pagan Torres* v. *Negron Ramos,* 578 F.2d 11, 14-15 (1st Cir. 1978). We are reminded in this respect of Mr. Justice Holmes' comments upon an outsider's perception of an unfamiliar legal system:

> "When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own legal education may lead us to see subordinations to which we are accustomed. But to one brought up within it, every emphasis tacit assumptions, unwritten practices, a

> thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz* v. *Gonzalez*, 261 U.S. 102, 106 (1923).

The district court's interpretation of the phrase "no ha lugar" is not inconsistent with our opinion in *Jimenez* v. *Jones*, 195 F.2d 159, 162-63 (1st Cir. 1952), *cert. denied*, 344 U.S. 840, where we recognized that the Puerto Rico Supreme Court's denial of a petition for habeas corpus "no ha lugar" may be a resolution of the merits of petitioner's claims but decided, under the particular circumstances of that case where no further explanation had accompanied the denial, that a determination on the merits had not been intended. Therefore, we cannot say that the district court's decision was clearly wrong.

Because the Puerto Rico Supreme Court passed on the merits of plaintiff's claims, it necessarily decided the constitutional issues raised. The denial of a motion for reconsideration raising constitutional issues, even though decided without opinion, ordinarily forecloses collateral litigation of the constitutional questions. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122, 124-25 (7th Cir. 1977). Where a final state court adjudication of matters relating to membership in a state bar has been had, the only federal review available is in the Supreme Court by petition for certiorari. *Martinez Rivera* v. *Trias Monge*, No. 78-1088 (1st Cir. Dec. 1, 1978).

Nor do we accept plaintiff's unsupported contention that the Puerto Rico Supreme Court was acting in an administrative capacity rather than as a court of law in passing upon her motions and that therefore the principles of res judicata do not obtain. It is settled by Puerto Rican case law that the admission of persons to the practice of law is a judicial function. *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236, 242, 245 (1942). The Supreme Court

entertains petitions for admission in the normal course of its judicial proceedings and renders decisions thereon. *See*, for example, *Ex parte Jimenez*, 55 P.R.R. 51 (1939).

We therefore uphold the ruling of the district court that plaintiff is precluded from relitigating the constitutional issues. *See Sylvander* v. *New England Home for Little Wanderers*, 584 F.2d 1103, 1107-08 (1st Cir. 1978).

Affirmed.

JUDGMENT FORM

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 78-1260

NYDIA MARIA DIAZ-BUXO,
Plaintiff, Appellant,

v.

HON. JOSE T. TRIAS MONGE, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT
Entered February 23, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

[cc: Ms. Diaz Buxo and Mr. Santana Bagur.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NYDIA MARIA DIAZ-BUXO	:	
Plaintiff	:	
vs.	:	CIVIL NO.
HON. JOSE TRIAS MONGE, Chief Justice of the Supreme Court of Puerto Rico, et als	:	75-116
Defendants	:	

FILED
MAR 2 4 40 PM '78
CLERK'S OFFICE
U.S. DISTRICT COURT
SAN JUAN, P.R.

OPINION AND ORDER

This case is before the Court upon a remand by the U. S. Court of Appeals for the First Circuit directing this Court to consider various issues and to convene a three-judge court if said issues were not found determinative of a final disposition in the present action. We were first directed to determine whether plaintiff had retaken the bar examination at issue herein so as to ascertain whether this case has become moot. To that effect, defendants filed copies of plaintiff's record before the Supreme Court of Puerto Rico in relation to her admittance to the practice of the law before said Court. Said record is devoid of any documents indicative that plaintiff has retaken the exam. On the contrary, it appears that plaintiff filed an informative writ before the Supreme Court on March 10, 1975 wherein she withdrew

her application to take the exam, in view of the fact that "the case [before the federal court] would turn *moot* were she to approve the bar exam of March 1975". (translation ours) We must thus now address the second issue posed by the Circuit Court, that is, the question of *res judicata.*

Defendants have filed a motion to dismiss on the grounds of *res judicata,* contending that plaintiff had posed the same legal questions raised herein before the Supreme Court of Puerto Rico, which questions had been decided against plaintiff and had become a final decision on the merits of her case reviewable only through certiorari by the Supreme Court of the United States.

As appears from the record of this case on December 3, 1974, plaintiff filed a motion entitled "Motion for Appeal and/or Review and/or Motion Under Rule 49 of Civil Procedure" before the Supreme Court of Puerto Rico. In said motion plaintiff attacked the bar exam as "lacking objectivity" and asked for a review of her case. Through a resolution on the consolidated cases for review of the bar exam by various petitioners, the Supreme Court denied said requests for review on December 17, 1974. Plaintiff's case was numbered MC 74-57 and on December 23, 1974, Ms. Diaz Buxo filed a second motion in said case requesting a copy of her bar exam, of the answer key to the same, of the rules adopted by the Supreme Court and by the Board of Bar Examiners (the Board) in relation to said exam, and of the minutes and records of the deliberations of the Board. She further requested inspection of the exams of all other applicants.

On the same date, December 23, 1974, plaintiff filed a Motion for Reconsideration before the Supreme Court of Puerto Rico, alleging that she had passed the bar exam, attacking the validity of the same, and contending that the

Supreme Court's determination against her admission to the bar lacked any basis and violated her due process and equal protection rights under the Constitution of the United States. On January 12, 1975, the Supreme Court of Puerto Rico issued a Resolution in Case No. MC-74-57, which stated in part as follows:

> "To the writs dated December 23, 1974, one entitled 'Motion for Reconsideration' and the other entitled 'Motion', *no ha lugar.*[1] The mechanics in the correction of bar exams forbids the examiner to make any traces of any kind in the corrected notebook, so that the following examiner in cases of recorrection will not have any indication of the evaluation effected by the first examiner. For such a reason, no practical ends would be achieved by permitting the aspirant to examine said notebooks after the same have been corrected." (translation and emphasis ours)

II

The doctrine of *res judicata,* although differentiated by some courts from collateral estoppel, has been stated to include this last doctrine within its scope. The Supreme Court of the United States stated in *Lawlor v. National Screen Service,* 349 US 322 at 326 that

> "[c]ollateral estoppel. . . precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."

[1]For a discussion on the meaning of the phrase "no ha lugar", see *infra.*

Thus, as stated in *Mastracchio v. Ricci,* 498 F.2d 1257 (1 Cir., 1974):

> "The term res judicata is sometimes used generically to cover a number of related principles. More narrowly, res judicata refers to preclusion of a cause of action, while collateral estoppel refers to preclusion of an issue."
> (*Id.*, 498 F.2d at 1259)

The application of the narrow definition of the doctrine of *res judicata* to the instant case would pose the basic problems of identity of the parties and mutuality. This is so because plaintiff's claims before the Supreme Court of Puerto Rico were classified and treated as an *ex parte* action wherein the Supreme Court did not act as a party. The Supreme Court has been sued as a party herein. However, identity of the parties and mutuality of estoppel are no longer required in applying collateral estoppel. "What is required is that the party against whom the plea is asserted . . . have been a party or in privity with a party to the prior adjudication". *Cardillo v. Zyla,* 486 F.2d 473, 475-76 (1 Cir., 1973). As stated in *P.I. Enterprises v. Cataldo,* 457 F.2d 1012 (1 Cir., 1972):

> "[T]he significant question is whether a party has had a 'full and fair' opportunity for judicial resolution of the same issue." (457 F.2d at 1015).

In ascertaining whether the requisites of "issue preclusion" are present in the instant case, we must determine whether the issues presented herein have been the object of adjudication on the merits in the sate action, and whether plaintiff had a "full and fair" opportunity for the resolution of such issues therein.

Plaintiff's assault on the procedures related to admission to the bar are grounded on the Due Process and Equal Protection Clauses of the Constitution of the United States. She attacks the objectivity of the bar exam, the lack of reviewing procedures, and the lack of access to the criteria and evaluation effected on the same. As noted above, all these issues were expressly presented by plaintiff before the Supreme Court of Puerto Rico through various motions in case MC-74-57. This includes the presentation of the substantive federal claims in plaintiff's "Motion" and "Motion for Reconsideration" of December 23, 1974 wherein she alleged in part:

> That the Supreme Court's determination related to petitioner, of not admitting her to the exercise of the law lacks basis and violates her right to due process and to the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America; because the rules for grading for approval are arbitrary and because the procedure of designing and correcting the exam is arbitrary itself". (Plaintiff's Motion for Reconsideration of December 23, 1974 before the Supreme Court of Puerto Rico, Par. 5)

We must thus conclude that the issues presented by plaintiff in the instant Section 1983 action are virtually identical to those advanced before the Supreme Court of Puerto Rico.

The local Supreme Court responded to plaintiff's aforementioned arguments, including the aforecited paragraph, with a "no ha lugar", stating additionally that, regarding the requests for examination of the notebooks, no purpose would be served by allowing plaintiff to see the same. Plaintiff contends that the phrase "no ha lugar"

implies that four members of the Supreme Court did not choose to review her motions, and her case was thus not heard on the merits.

We disagree. The sacramental connotations of the phrase "no ha lugar" as an administrative disposition of a case are proper only in the context of a writ of certiorari. See, e.g., *Suarez v. Administrador del Deporte Hipico,* 354 F. Supp. 320 (1972). However, "no ha lugar" in the context of a motion for reconsideration is clearly a consideration of the merits of said motion. Although there is no discussion on the definition of a "no ha lugar" related to motions for reconsideration in Puerto Rican case law, the common practice of the Puerto Rican Supreme Court so dictates. Thus, "no ha lugar" to a motion for reconsideration is no different from a "reconsideration denied". This becomes more apparent in the instant case when we notice that in the Supreme Court's resolution of February 12, 1975, the "no ha lugar" was accompanied with an explicit consideration of some of the arguments propounded by plaintiff in her motion. The Supreme Court thus explained the futility of granting plaintiff's requests to examine the examination notebooks, as the same would not have any markings. To conclude that a "no ha lugar" in the context of a motion for reconsideration is the same as in a denial of certiorari would certainly be inconsistent with the practical and historic understanding of the operation of the Supreme Court of Puerto Rico. We must thus hold that plaintiff's federal claims were addressed on the merits by the local Supreme Court. Her attack on the constitutionality of bar admission procedures, if found meritorious, could have resulted in an appropriate judgment by the Supreme Court of Puerto Rico. As is well known,

> "[S]tate courts have jurisdiction to decide federal issues except in areas where federal courts have been granted exclusive jurisdiction." *(P.I. Enterprises, Inc. v. Cataldo,* 457 F.2d 1012, 1014 (1972).

We see no reason why plaintiff's claim could not have been disposed in her favor, had the local Court considered it tenable. She was thus afforded an opportunity to be heard and a "full and fair opportunity" for the resolution of the issues presented. Consequently, we have no choice but to hold that plaintiff is estopped from re-litigating the same issues before this Court.

In view of the above, the instant case is hereby dismissed as *res judicata.*

Judgment shall be entered accordingly.

San Juan, Puerto Rico, May 2, 1978.

/s/ Hernan G. Pesquera
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NYDIA MARIA DIAZ-BUXO	:	
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL NO.
	:	75-116
HON. JOSE TRIAS MONGE,	:	
Chief Justice of the Supreme	:	
Court of Puerto Rico, et als	:	
	:	
Defendants	:	
	:	

JUDGMENT

The Court, through the Honorable Hernan G. Pesquera, has entered an Opinion and Order upon remand by the United States Court of Appeals for the First Circuit.

Wherefore, it is ODERED AND ADJUDGED that this case be and is hereby dismissed as *res judicata.*

IT IS SO ORDERED.

San Juan, Puerto Rico, May 8, 1978.

RAMON A. ALFARO
Clerk of the Court

By: Federico L. Basora
Chief Deputy Clerk

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1064

NYDIA MARIA DIAZ-BUXO,
Plaintiff, Appellant,

v.

HONORABLE JOSE TRIAS MONGE,
CHIEF JUSTICE OF THE SUPREME COURT
OF PUERTO RICO, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF PUETO RICO
[Hon. Hernan G. Pesquera, *U.S. District Judge*]

Before,

COFFIN, *Chief Judge,*

CAMPBELL, *Circuit Judge,*

WOLLENBERG, *District Judge.*°

Nydia Maria Diaz-Buxo on brief pro se.
Hector A. Color Cruz, Solicitor General and
Condita R. Orlandi, Assistant Solicitor General
on brief for appellees.

December 14, 1977

---

*Of the Northern District of California, sitting by designation.

Per Curiam. When appellant was notified that she failed the Puerto Rico bar examination in 1974, she asked for certain material in order to satisfy herself that her examination was correctly graded. This request was denied. She thereupon brought this action in the District Court for the District of Puerto Rico under inter alia, 42 U.S.C. §1983, seeking declaratory and injunctive relief against the Justices of the Supreme Court of Puerto Rico and the Board of Bar Examiners of Puerto Rico, and further requesting that a three-judge court be convened under the then applicable 28 U.S.C. §2281. She alleges that she is certain that she passed; moreover, that others were given passing grades even though they scored beneath the minimum required. A single judge of the district court, without having acted on the request for a three-judge court, dismissed for lack of a substantial federal question.

Appellant's principal contention is that the lack of any reviewing procedures under Puerto Rico's regulations governing her admissions violates due process requirements. There is very little support for appellant's position, so long as she was afforded the opportunity to retake the examination. *Tyler v. Vicker,* 417 F.2d 1089, 1103-05 (5th Cir. 1975); *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474, 477-79 (7th Cir. 1974); *In Re Mead,* Mass. Adv. Sh. (1977) 599, *cert. denied,* 466 U.S.L.W. 3218 (U.S. Oct. 3, 1977); *see Feldman v. State Board of Law Examiners,* 438 F.2d 699, 703 n.6 (8th Cir. 1971); Davis, Administrative Law (1958) Sec. 7.09 p.445. *Cf.* 5 U.S.C. §554(a)(3). *Contra, Richardson v. McFadden,* 540 F.2d 744, 752 (7th Cir. 1976) (dictum). However, as the Supreme Court has never ruled on the issue of the due process requirements attendant upon bar examinations, and as at least one circuit questions whether the right of reexamination alone fully

satisfies any such requirements,[1] we have difficulty saying that the issue plaintiff seeks to raise is so obviously groundless as to render unnecessary the convening of a three-judge court. "[P]rior decisions [do not] inescapably render the claims frivolous", even though, given the precedents, it may well be that the claim is "of doubtful or questionable merit". *Goosby v. Osser,* 409 U.S. 512, 518 (1973). We hold that the single district judge was without jurisdiction to dismiss plaintiff's claim as meritless. Only a court of three judge could do this.

We must, therefore, remand. *Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715-16 91961). We observe, however, that while only a three-judge court has jurisdiction to pass on the merits of plaintiff's due process claim, there are several other, non-constitutional bases for possible disposition to which the single judge should now address himself prior to requesting the convening of such a court. Cases should, if possible, be disposed of on non-constitutional grounds, *see Ohio Bureau of Employment Services v. Hodory,* ____ U.S. ____, 45 U.S.L.W. 4544 (U.S. May 31, 1977); and a single judge may act upon such matters. The nonconstitutional bases which we perceive for possible disposition by the single judge are as follows: First, there may now be a question of mootness. Appellant took the examination, which is the subject of this suit, in 1974. Nothing in the record before us indicates whether she has retaken the exam, if if so, whether she has passed. If she is now a member of the Bar of Puerto Rico, this case would now be moot. *See DeFunis v. Odegaard,* 416 U.S. 312 (1974). Second, there remains the possibility that this action is

[1]This circuit has never passed on this issue.

barred by the doctrine of *res judicata.* The federal and commonwealth courts have coordinate jurisdiction to resolve constitutional questions. Once having presented an issue in the commonwealth courts, a litigant *may not litigate* the issue a second time in the federal courts. *Bricker v. Crane,* 468 F.2d 1228, 1231 (1st Cir. 1972). Appellant states that on December 23, 1974, she "filed, in the Puerto Rico Supreme Court, . . . motion asking for . . . Reconsideration of the Board's decision invoking violations of her due process and equal rights under the United States Constitution", app. 10. Even though in some places appellant alleges that "the Puerto Rico Supreme Court did not act on these motions", app. 10, she also provided a translation of a "Resolution" of that court, dated February 12, 1975, denying her motion for reconsideration. Ms. Diaz-Buxo argues that the language used by the court "no ha lugar", means that four members of the Supreme Court did not choose to review it, rather than there having been a denial on the merits. The case she relies upon, *Suarez v. Administrador del Deporte Hipico de Puerto Rico,* 354 F. Supp. 320 (1972), construed this language in the context of a writ of certiorari, and not in regard to a motion for reconsideration. It is not clear to us that the interpretation placed upon "no ha lugar" is transferable. In construing local procedure, we would give considerable weight to the expertise of the district court. Even if the Puerto Rico Supreme Court did not address her due process arguments on the merits, its decision may still bar raising the issue in federal court, *Lovely v. Laiberte,* 498 F.2d 1261, 1263 (1st Cir.), *cert. denied,* 419 U.S. 1038[2] (1974), leaving her to seek certiorari from the

[2] "Res judicata, when the suit is between the same parties and concerns the same operative nucleus of fact, is of broader scope and bars issues even if unlitigated." *Id.*

United States Supreme Court. On the other hand, if the Supreme Court of Puerto Rico entertained appellant's motions in an administrative capacity only, rather than as a court of law, its ruling might not have had a res judicata effect. All such inquiries are, of course, premature until its known whether appellees will raise this defense in their answer, no answer having as yet been filed.

If neither of the above issues is determinative, or if the answer to them is uncertain, the district court should request the appointment of a three-judge court.

Remanded for further procedings in accordance with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1064.

NYDIA MARIA DIAZ-BUXO,
Plaintiff, Appellant,

v.

HONOABLE JOSE TRIAS MONGE,
CHIEF JUSTICE OF THE SUPREME COURT OF
PUERTO RICO ET AL.,
Defendants, Appellees.

JUDGMENT
Entered December 14, 1977

This cause was submitted on briefs on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the cause is remanded for further proceedings in accordance with the opinion filed this day No costs at this time.

By the Court:

/s/ Dans R. Gallup
Clerk.

[cc: Ms. Diaz-Buxo and Mr. Colon Cruz.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NYDIA MARIA DIAZ-BUXO	:	
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL NO. 75-116
	:	
HON. JOSE TRIAS MONGE, Chief Justice of the Supreme Court of Puerto Rico The Supreme Court of Puerto Rico, composed by its associate judges: HON. MARCO A. RIGAU, et als	:	FILED & ENTERED Dec 16 1976 CLERK, U.S. DISTRICT COURT SAN JUAN, PUERTO RICO
Defendants	:	

JUDGMENT

Plaintiff in the above captioned case filed a complaint requesting the convening of a three-judge court and asking this Court to declare the Supreme Court's procedure for the licensing of lawyers in Puerto Rico violative of the Fifth and Fourteenth Amendments to the Constitution of the United States. It is alleged that the lack of procedural safeguards and remedies in the handling and denial of applications for licenses to practice law in Puerto Rico violates the Due

Process Clause. Plaintiff further avers that she has passed the Bar Exam, but was notified that she failed[1] it and has since been denied her purported right to see, examine and have access and knowledge of all the evidence pertaining her exam.

We agree with interpretations of the Due Process Clause which warrant intervention of federal courts in state determination for purposes of admission to a Bar, when such determination is allegedly predicated upon a constitutionally impermissible reason. Nevertheless, nothing in plaintiff's complaint indicates that she was denied admission for such a reason. Consequently, we would be precluded from entering into speculative constitutional attacks in the absence of specific allegations. See *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474, 477 (1974).

In *Francisco Diaz Marchand, et als. v. The Supreme Court of Puerto Rico, et als,* Civil No. 74-50, decided on March 13, 1975, a three-judge court dismissed an action which raised essentially the same matters presented herein, sating:
stating:

> "With respect to plainiff's claims against the procedures followed by the Bar Examiners in not discussing results with those who fail, in not allowing those who fail to review their exams . . . . . ., it is hereby decided that they are without merit and insubstantial from a constitutional point of view. See *Goosby v. Osser,* 409 US 512 (1973); *Whitfield v. Illinois Bd. of Examiners,* 43 LW 2165 (1974)."

[1]The only evidence submitted regarding this particular matter indicates contrariwise.

We find no significant differences between the pertinent arguments in *Diaz Marchand, supra,* and those brought to our attention in the present case.

WHEREFORE, in view of the aforementioned, and in view of the opinions rendered in the cases of *Rivera Arvelo v. The Supreme Court of Puerto Rico,* Civil No. 970-73 (DCPR 1974), *Theard v. United States,* 354 US 278, 281, *Gately v. Sutton,* 310 F.2d 107 (10 Cir. 1962), *Jones v. Hulse,* 391 F.2d 198 (8 Cir. 1968), *Lenske v. Sercombe,* 266 F. Supp. 609 (D. Ore. 1967) and *Potts v. Honorable Justices of the Supreme Court of Hawaii,* 332 F. Supp. 1392 (1971), this case is hereby dismissed for lack of a substantial federal question.

San Juan, Puerto Rico, December 15, 1976.

/s/ HERNAN G. PESQUERA
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1746

NYDIA MARIA DIAZ-BUXO

Petitioner,

v.

HON. JOSE TRIAS MONGE, CHIEF JUSTICE OF THE SUPREME COURT OF PUERTO RICO, ET ALS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

HECTOR A. COLON CRUZ
Solicitor General

MIGUEL A. SANTANA BAGUR
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PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1746

NYDIA MARIA DIAZ-BUXO

Petitioner,

v.

HON. JOSE TRIAS MONGE, CHIEF JUSTICE OF THE SUPREME COURT OF PUERTO RICO, ET ALS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE COURT:

Now come the Respondents through their undersigned attorneys and respectfully pray that the Writ of Certiorari requested by Petitioner to review the opinion and judgment of the United States Court of Appeals for the First Circuit entered on these proceedings on February 23, 1979, be denied.

I

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, not yet officially published, is printed in the Appendix to Petition for a Writ of Certiorari.

II

JURISDICTION

The jurisdiction of this Honorable Court is correctly invoked under 28 U.S.C.A. Sec. 1254 (1).

III

QUESTIONS PRESENTED

Due to our disagreement with the questions presented for review as stated in the Petition for a Writ of Certiorari, we respectfully submit the following question for review as the controlling one:

Whether the United States District Court for the District of Puerto Rico properly dismissed the instant case on the grounds of Res Judicata.

IV

STATEMENT OF THE CASE

After the results of the bar examinations prevented her admission to the bar of the Supreme Court of the Commonwealth of Puerto Rico, herein Petitioner filed a complaint in the United States District Court for the District of Puerto Rico, under the Civil Rights Act, against the Justices of the Supreme Court of

Puerto Rico and the members of the Bar Examining Board. The action requested the convening of a Three-Judge Court to declare the inconstitutionality of the procedure of the Supreme Court of Puerto Rico for the licensing of lawyers, as violative of the Fifth and Fourteenth Amendment to the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C.A. Sections 1331, 1343 (3) (4), 2281, 2284, 42 U.S.C.A. Section 1981, 1983 and 5 U.S.C.A. Section 703.

The complaint alleged that the Due Process Clause is violated as there is a lack of procedural safeguards and remedies in the handling and denial of applications for licenses to practice law in Puerto Rico. Specifically, her contention was that she had passed the bar examinations, but was notified that she failed and has since then denied her alleged right to see, examine and have access and knowledge of all the evidence pertaining to the grading of her examination papers.

Moved by defendant's Motion to Dismiss[1] for lack of jurisdiction, the U.S. District Court for the District of Puerto Rico entered a judgment dismissing the case for lack of a substantial federal question. (Appendix of Petition, p. 25-27).

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[1] While defendants' Motion to Dismiss was pending resolution, and prior to the District Court's disposition of the case, defendants submitted an Informative Motion advising the District Court of the recent order issued by a Three-Judge Court in the case of *Francisco Diaz Marchand, et al* v. *The Supreme Court of Puerto Rico*, Civil No. 74-50, where dismissal was entered for lack of a substantial constitutional claim. Said case, although not identical, presented related issues and allegations with the case at bar. For that reason, defendants reiterated their dismissal request for the grounds set forth in their previous Motion to Dismiss.

On appeal to the U.S. Court of Appeals for the First Circuit the case was reversed and remanded. It was decided that a single District Judge was without jurisdiction to dismiss plaintiff's claim as meritless. Only a court of three judge could do that. However, bearing in mind that cases should, if possible, be disposed of on non-constitutional grounds, being able to act upon such matters a single judge, the Court of Appeals instructed the District Court to consider as possible grounds for disposition of the case, first, the question of mootness and, second, the possibility that the action was barred by the doctrine of res judicata. If neither of those issues were determinative, or if the answer to them was uncertain, it was ordered that the District Court should request the appointment of a three-judge court. (Appendix of Petition, p. 21-23)

The U.S. District Court, in accordance with the Court of Appeals' mandate, ordered the defendants to file their answer to plaintiff's complaint within ten days from the entry of the same and to submit therewith documentation indicating whether or not plaintiff (herein petitioner) had retaken the bar exam and passed. Eleven days after entry of the District Court's order, defendants, without filing an answer, moved to dismiss on the basis of res judicata and submitted a copy of plaintiff's record before the Supreme Court of Puerto Rico, from which it clearly appears that plaintiff voluntarily withdrew her application to retake the bar exam to avoid mootness of the case. Plaintiff subsequently sought unsuccessfully to default the defendants for failure to comply with the Court's order. Plaintiff's complaint was dismissed on res judicata grounds. (Appendix of Petition, p. 11-17)

On second appeal, the Court of Appeals for the First Circuit upheld the ruling of the District Court precluding plaintiff to relitigate her constitutional issues in the federal forum, having the Supreme Court of Puerto Rico adjudicated the same on the merits. To arrive at said decision, the Court of Appeals considered the nature of the request made by the Petitioner before the Supreme Court of Puerto Rico, and the expertise of the District Court upon construing local procedure such as interpreting certain language used by the Supreme Court of Puerto Rico when denying petitioner's claims. (Appendix of Petition, p. 1-9)

V.

ARGUMENT

Petitioner disputes, as one of the questions presented for review in the Petition for a Writ of Certiorari, the sufficiency of a denial of an Ex Parte Petition which contains the language "no ha lugar" as an appropriate ground for res judicata, and also, as an adecuate ground for petitioning a writ of certiorari from this Honorable Court. Certainly, if there is a fundamental issue involved in the instant case, that should be the one.

Once the petitioner was notified of her unfavourable results on the bar examination, she resorted to the Supreme Court of Puerto Rico seeking remedies. Thus, petitioner filed a writ attacking the bar exam as "lacking objectivity" and asked for a review of her case, request which was denied. Then, petitioner filed two more writs, requesting, among others, a copy of her bar exam, of the answer key to the same, inspection of the exams of all other applicants, etc. In one

of the writs, which was entitled "Motion for Reconsideration", petitioner explicity stated that her request addressed itself to her constitutional rights to equal protection of the laws and to the due process of law granted by the Fifth and Fourteenth Amendment to the Constitution of the United States of America. The substantive federal claim was specifically presented as follows:

> "That the Supreme Court's determination related to petitioner, of not admitting her to the exercise of the law lacks basis and violates her right to due process and to the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America; because the rules for grading for approval are arbitrary and because the procedure of designing and correcting the exam is arbitrary itself." (Appendix of Petition, p. 5-6)

The Supreme Court of Puerto Rico, upon considering petitioner's request, issued a Resolution in the plaintiff's (herein petitioner) exparte proceeding which stated in part as follows:

> "To the writs dated December 23, 1974, one entitled 'Motion for Reconsideraton' and the other entitled 'Motion', "*no ha lugar.*" The mechanics in the correction of bar exams forbids the examiner to make any traces of any kind in the corrected notebook, so that the following examiner in cases of recorrection will not have any indication of the evaluation affected by the first examiner. For such a reason, no practical ends would be achieved by permitting the aspirant to examine said notebooks after the same have been corrected." (Appendix of Petition, p. 13)

As it was correctly held in the instant case, there is no doubt that petitioner's constitutional claim

raised in her sec. 1983 suit was virtually identical to that advanced before the Supreme Court of Puerto Rico; claim which the Supreme Court of Puerto Rico, acting as a *court* of *law*,[2] entertained on the merits and disposed of properly. Hence, it must be concluded that the petitioner was estopped from relitigating the same constitutional issue before the District Court.

The language "no ha lugar", used by the Supreme Court of Puerto Rico when disposing petitioner's claims, in the context of a petition for certiorari to the Puerto Rico Supreme Court is equivalent to the statement "certiorari denied", or that the Court will not exercise its discretion to grant the extraordinary relief requested. *Suarez* v. *Administrador del Deporte Hipico de Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972); *Borinquen Furniture, Inc.* v. *District Court*, 78 P.R.R. 858, 861 (1956); *Bartolomei* v. *Superior Court*, 77 P.R.R. 436, 437 (1954); *Algarin* v. District Court, 59 P.R.R. 848 (1942). See also *Fernandez* v. *Trias Monge*, 586 F.2d 848, 857 (1st. Cir. 1978). However, the U.S. District Court for the District of Puerto Rico, based on its familiarity with local procedure, correctly ruled that while "no ha lugar" is an administrative disposition of a case in the context of a writ of certiorari, in the instant proceeding it was equivalent to the statement "reconsideration denied" and was a disposition on the merits of petitioner's constitutional

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[2] It is well settled by Puerto Rican case law that the admission of persons to the practice of law is a judicial function. *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236, 242, 245 (1942). The Supreme Court of Puerto Rico entertains petitions for admission in the normal course of its judicial proceedings and renders decisions thereon. See, for example, *Ex Parte Jimenez*, 55 P.R.R. 51 (1939).

claims. It was also noted that such an interpretation was underscored by the fact that the Supreme Court of Puerto Rico had accompanied the "no ha lugar" by an explicit consideration of some of petitioner's arguments. (Appendix of Petition, p. 16)

The District Court's interpretation of the phrase "no ha lugar" conforms with the practical and historic understanding of the operation of the Supreme Court of Puerto Rico, and in no way results inconsistent with the opinion of the Court of Appeals for the First Circuit in the case of *Jimenez* v. *Jones*, 195 F.2d 159, 162-63 (1st Cir. 1952), cert. denied, 344 U.S. 840. In that case it was recognized that the Puerto Rico Supreme Court's denial of a petition for habeas corpus "no ha lugar" may be a resolution of the merits of petitioner's claims but decided, due to the particular circumstances of the case where no further explanation had accompanied the denial, that a determination on the merits had not been intended. Therefore, not being the District Court's interpretation of the phrase "no ha lugar" in the context of a Motion for Reconsideration "inescapably wrong" or "patently erroneous", substantial deference must be accorded to the District Court's determination on this matter of local procedure. *Berrios Rivera* v. *British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 43 (1970); *Bonet* v. *Texas Co.*, 308 U.S. 463, 470-71 (1940); *Bonet* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 510 (1939); *Pagan Torres* v. *Negron Ramos*, 578 F.2d 11, 14-15 (1st Cir. 1978), cert. denied 58 L Ed. 2d 682 (1978).

Having the Supreme Court of Puerto Rico passed on the merits of petitioner's claims, it necessarily decided the constitutional issues raised. *Grossgold* v. *Supreme Court of Illinois*, 557, F.2d 122, 124-25 (7th Cir. 1977). Thus, petitioner's only federal review available was at this Honorable Court by petition for certiorari. 28 U.S.C.A. Sec. 1258 (3).

On the other hand, regarding the procedural aspects of the form in which res judicata was raised in the instant case, we must say that, certainly, the petitioner attributes to it more significance that it really has.

First of all, although ordinarily res judicata is pleaded as an affirmative defense, Fed. R. Civ. P. 8(c), as held by the Circuit Courts of Appeals, where the substantive rights of parties are not endangered, it is within the discretion of the District Court to permit it to be raised by motion. *Lambert* v. *Conrad*, 536 F.2d 1183 (7th Cir. 1976); *Thomas* v. *Consolidated Coal Co.*, 380 F.2d 69 (4th Cir. 1967), cert. denied, 389 U.S. 1004, reh. denied, 399 U.S. 1059. In the case at bar, petitioner had a full opportunity to respond to defendants' motion as she in fact did in her lengthy motion in opposition to defendants' motion to dismiss. Having filed a previous motion to dismiss for lack of jurisdiction under Rule 12(b) of the Federal Rules of Civil Procedure did not barred defendants from raising res judicata in a pre-answer motion to dismiss, since the prohibition of Rule 12(g) of the Federal Rules of Civil Procedure against successive pre-answer motions expressly covers only those motions brought under Rule 12, though, as correctly held by the Circuit Court of Appeals, its policy may pertain in other instances.

Whether it was timely filed or not, the District Court had ample discretion to consider said motion

even though it was filed one day past due and apart from the applicability of the enlargement period provided by Rule 6(e) of the Federal Rules of Civil Procedure.

Even so, said motion to dismiss was pr[illegible]erly supported with some exhibits consisting of copies of petitioner's motions (written by herself) to the Supreme Court of Puerto Rico and the Court's responses thereto. One of the documents submitted was signed by the Clerk of the Supreme Court of Puerto Rico and certified the remainder as being copies of the originals. The best proof of their authenticity resides on the fact itself of the District Court's acceptance of them, even though petitioner's reiterated objections.

The fact that said documents where in the Spanish language and untranslated did not prevent the District Court from considering them, since under Rule 6 of the Rules of the United States District Court for the District of Puerto Rico, the district court has discretion to order the acceptance of documents in a language other than English. (Appendix of Petition, p. 4-5) Moreover, the translation to the English language of some portions of the documents made by the District Court Judge, even though it is not the usual proceeding, was clearly inconsequent. All the parties involved where fully conversant with Spanish; petitioner never alleged that the documents were not readily understood by her, nor questioned the accuracy of the judges' translation. So, taking into account the aforementioned reasons, it cannot be validly argued that the decision below is "totally devoid of evidentiary support" as to render it per se unconstitutional under the due process clause.

Therefore, it must be concluded, as correctly held by the Circuit Court of Appeals, that in the instant case res judicata was properly raised in an adequately supported pre-answer motion to dismiss.

Finally, petitioner contends that the system of admissions and licensing procedure of the law profession in Puerto Rico are a "secret system of quotas" which conflicts with this Honorable Court's decisions in cases like *Regents of the University of California* v. *Bakke,* 46 Law Week 4896 (1978).

Even though this matter was not subject to revision before the Circuit Court of Appeals, we must affirm that there are not such things as "quotas" or a "secret system" to discriminate in the licensing procedure of the law profession in Puerto Rico.

In support of her highly speculative contention petitioner relies on the dissenting opinion of the late Justice Santana Becerra in *In Re Request of the Board of Bar Examiners,* 97 P.R.R. 843 (1969).

. Petitioner misconceives Justice Santana's dissent. What appears patently from said dissenting opinion is the Justice's preocupation that the study ordered to be conducted by the Highest Council of Education regarding the teaching of law in the schools of law of Puerto Rico would contain all the concurrent factors which might have given rise to the existence of a high percentage of failures of law graduates in their bar examinations. Thus, at page 853 it expressly rejected groundless speculations such as petitioner's ones.

> "(7) It is a true fact which I must set forth, in part because of the wrong and groundless speculations which have been made in outside sources as a result of the lack of knowledge of the pro-

> cedure followed, that both by the Board and by the Court, the procedure of readjustment has been the result of a rational weighing of factors involved equally applicable to all candidates, and equally benefiting all of them in their respective grades . . .
>
> * * *
>
> (m) In the discharge of my responsibility in all this problem I must reject, because they are not supported by the facts, the wrong speculations expressed in other spheres in the sense that all this situation might be the result of the interest of a professonal class to curtail the entrance to the bar . . . I repeat that I do not find any factual basis."

It is manifest that there is no conflict of decisions nor an important question of federal law requiring decision by this Honorable Court.

VI
CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico, July 25, 1979

HECTOR A. COLON CRUZ
Solicitor General

MIGUEL A. SANTANA BAGUR
Assistant Solicitor General